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No. 91-1452

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHICAGO TRIBUNE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly determined that allegations of racial discrimination against a union may not be raised by an employer to challenge the union's certification as a collective bargaining representative, but, instead, should be adjudicated in unfair labor practice proceedings against the union.

2. Whether the court of appeals erred in enforcing the Board's order without requiring supplementation of the administrative record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) and its order on rehearing (Pet. App. A16-A17) are reported at 943 F.2d 791. The decision and order of the National Labor Relations Board (Board) (Pet. App. A21-A28) is reported at 298 N.L.R.B. No. 162. The Board's Decision and Certification of Representative (Pet. App. A31-A32) and Report on Objections of the Board's Regional Director (Pet. App. A33-A55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1991. A petition for rehearing was granted on December 9, 1991, and the court entered an order on that date clarifying its denial of petitioner's motion for supplementation of the record. Pet. App. A16-A17. The petition for a writ of certiorari was filed on March 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the publisher of a daily newspaper in Chicago, Illinois. For approximately four decades, petitioner obtained many of its electricians through referrals from the union hall of Local 134, International Brotherhood of Electrical Workers (Union). Most of petitioner's electricians became members of the Union. During that time, however, petitioner did not have a formal collective bargaining relationship with the Union. Pet. App. A35.

In July 1988, based on the Union's petition, the Board held a representation election among petitioner's electricians. The Union won the election by a vote of 25 to 14. Pet. App. A33. Petitioner filed objections to the conduct of the Union during the election. The objections alleged, *inter alia*, that the Union had threatened the employees with loss of Union pension benefits, had threatened to "blackball" employees from working in other union shops if they did not support the Union, and had promised and granted enhanced Union benefits in return for support in the election. *Id.* at A36-A50.

The Regional Director, based on an administrative investigation in which the parties were permitted to submit evidence, overruled the objections and recom-

mended that the Union be certified as the representative of petitioner's electricians. Pet. App. A34, A53. In the investigation, the Regional Director considered the affidavits of twelve employees and two supervisors submitted by petitioner, as well as testimony and affidavits obtained by Regional Office personnel. *Id.* at A34. The Regional Director concluded that there was no probative evidence to support the allegations concerning union benefits. *Id.* at A38-A39, A43-A50. The Regional Director further concluded that the "blackballing" threat, assuming that it occurred, would not be grounds to set aside the election because it was made several months before the election and was not disseminated to the employees. *Id.* at A41. In accordance with Board rules, the Regional Director therefore determined that petitioner's objections failed to raise issues warranting a hearing.[1]

Petitioner filed exceptions with the Board, challenging the Regional Director's decision and contending that it was entitled to an evidentiary hearing on various of its objections. Pet. App. A31 n.1. The Board adopted the Regional Director's findings and certified the Union. In light of the administrative record, the Board agreed with the Regional Director that petitioner's objections raised "no 'substantial and material factual issues' " that would entitle it to a hearing on its objections. *Id.* at A31-A32 n.1.[2]

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[1] The Board's Rules and Regulations provide that the Regional Director may resolve objections without holding an evidentiary hearing if the objections fail to "raise substantial and material factual issues." 29 C.F.R. 102.69(d).

[2] The administrative record contained the affidavits submitted by petitioner to the Regional Director, which petitioner put before the Board pursuant to 29 C.F.R. 102.69 (g) (3). The administrative record did not contain the wit-

2. Petitioner refused to bargain with the Union, and the Union filed unfair labor practice charges. The Board held that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and entered a bargaining order. Pet. App. A24-A25. The Board found that all issues raised by petitioner in objection to the Union's certification were or could have been litigated in the underlying representation proceeding and that petitioner did not offer to adduce any newly discovered or previously unavailable evidence, nor did it allege any special circumstances that would require the Board to reexamine the decision made in that proceeding. *Id.* at A22-A23.

The Board refused to consider petitioner's allegation that "on information and belief the Union practices racial and sexual discrimination." Pet. App. A22 n.2. In so doing, the Board rejected petitioner's request that it overrule its decision in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), in which the Board had held that "allegations of racial and other types of discrimination are properly cognizable under the duty of fair representation and must be adjudicated under Sec. 8(b) of the Act and cannot constitute a defense to an 8(a)(5) proceeding." Pet. App. A22 n.2.

3. The court of appeals enforced the Board's order. Pet. App. A2. After reviewing petitioner's objections, the court found that substantial evidence

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ness statements gathered independently by the Regional Director in his investigation, because the Board's rules provide that the record consists, *inter alia*, of "documentary evidence, *excluding statements of witnesses*, relied upon by the Regional Director in his decision or report." 29 C.F.R. 102.69(g)(1)(ii) (emphasis added). See *Summa Corp.*, 265 N.L.R.B. 343 (1982), enforced, 734 F.2d 21 (9th Cir. 1984) (Table).

supported the Board's determination that petitioner did not present a prima facie case for setting aside the election. The court of appeals therefore held that the Board properly concluded that petitioner was not entitled to an evidentiary hearing on its objections. *Id.* at A5-A11.

The court of appeals also rejected petitioner's assertion that "the regional director erred by resolving credibility disputes on the basis of his *ex parte* interviews." Pet. App. A10. The court noted that it was petitioner's burden to "proffer 'specific evidence from or about specific people' " indicating that the election had been affected by particular conduct. The court agreed with the Board, however, that petitioner "proffered no specific evidence of conduct sufficient to set aside the election." *Ibid.* The court explained that "our review of the record indicates that the hearing officer accepted as true the Company's allegations, but considered these allegations insufficient to set aside the election." *Ibid.*[3]

Finally, the court of appeals rejected petitioner's contention that the Board should have accorded it a hearing on its allegation that the Union discriminates against employees based on race. The court noted

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[3] Petitioner had filed a motion with the court of appeals seeking supplementation of the record with the materials that the Regional Director had considered but had not transferred to the Board as part of the administrative record. The motion was referred to the panel assigned to hear the merits of the case. Pet. App. A18-A19. The court of appeals did not explicitly address the motion in its opinion, but subsequently granted petitioner's petition for rehearing for the limited purpose of denying the motion. The court did not reach the merits of the motion, because it concluded that, as petitioner had not raised its objection to the content of the administrative record before the Board, it could not raise the issue for the first time before the court. *Id.* at A16-A17.

that in *Handy Andy*, the Board had established that "employer allegations of union racial discrimination will not be entertained as a defense to a refusal to bargain [charge] unless that allegation relates to unfairness in the election itself." Pet. App. A11. The Board found that petitioner "ha[d] not provided concrete evidence that the alleged union discrimination was in any way related to the election or the pre-election campaign." *Id.* at A12. The court disagreed with petitioner that the Board's *Handy Andy* policy "ha[d] not been favorably received by the courts," noting that "no court has explicitly rejected *Handy Andy*" and that the cases cited by petitioner as rejecting it are "easily reconciled with *Handy Andy*." *Id.* at A12 n.9.

ARGUMENT

1. Petitioner contends (Pet. 15-24) that the Board's rule in *Handy Andy*, 228 N.L.R.B. 447 (1977), that an employer may not object to certification of a union on the theory that the union practices racial discrimination is incorrect, and that the court of appeals' endorsement of that rule conflicts with decisions of other courts of appeals. The Board's decision in *Handy Andy* represents a reasonable interpretation of the Act and review of this issue is not warranted.

a. In *Handy Andy*, the Board overruled its decision in *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), and held that, unless racial discrimination by the union relates to unfairness in the election process, an employer's allegation of union racial discrimination will not be entertained prior to certification of a union (or as a defense to a refusal to bargain with the certified union). The Board concluded that the policies of the Act are better effectu-

ated by considering allegations that a labor organization practices invidious discrimination in separate unfair labor practice proceedings against the union under Section 8(b) of the Act, 29 U.S.C. 158(b), rather than in a representation proceeding and the related unfair labor practice proceeding under Section 8(a)(5), 29 U.S.C. 158(a)(5).[4] 228 N.L.R.B. at 448.

The Board rejected the view that the Constitution requires the Board to determine whether a union practices discrimination prior to certifying it as the representative of the employees. The Board explained that certification is simply "an acknowledgment that a majority of the employees in an appropriate bargaining unit have selected the union as their exclusive bargaining representative." 228 N.L.R.B. at 450. The Board added that, "while use of Board processes and the Board's certification may have helped a union gain the powers of bargaining representative established by the Act, the union has not been authorized to discriminate in the exercise of those powers." *Ibid.* Indeed, "the duty of fair representation in its various forms *specifically prohibits* a union from practicing unlawful discrimination under the authority of the Act." *Ibid.*[5]

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[4] When an employer refuses to bargain in order to test the validity of the union's certification, the unfair labor practice proceeding under Section 8(a)(5) for failure to bargain and the prior representation proceeding "are really one." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 158 (1941).

[5] The Board noted, 228 N.L.R.B. at 455-456, that invidious discrimination by a union in various guises violates Section 8(b)(1)(A), (2), and (3) of the Act ,29 U.S.C. 158(b)(1)(A), (2) and (3). See, *e.g.*, *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The Board also noted that it is authorized to revoke the certification of a union that practices invidious discrimi-

The Board also concluded that allowing the employer to litigate the union's racial practices in the representation proceeding would "significantly impair the national labor policy of facilitating collective bargaining." 228 N.L.R.B. at 452. First, such a rule would deny unit employees the right guaranteed in Section 7 of the Act, 29 U.S.C. 157, to bargain collectively through their chosen representative. 228 N.L.R.B. at 452. Second, such a rule would promote delay in the representation process by providing employers "with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination." *Id.* at 453.

Petitioner suggests (Pet. 24) that it would be a "better rule" if the Board were to permit employers to avoid the obligation to bargain collectively where the elected union has in the past engaged in discrimination. That claim reflects petitioner's disagreement with the Board's balance of the competing policies, and its doubts about whether the duty of fair representation is adequate to protect employees against discrimination. Pet. 14, 22-24. It is for the Board, however, to balance the competing policies of the Act. See, *e.g.*, *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2222 (1991). While racial discrim-

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nation with respect to bargaining unit employees. See *Independent Metal Workers Union, Local No. 1*, 147 N.L.R.B. 1573 (1964). In the Board's judgment, unfair labor practice proceedings alleging a breach of the union's duty of fair representation provide a superior way to consider allegations of discrimination, for that process "affords the charged party [the union] the full panoply of due process of law without at the same time denying or delaying the employees' right to the services of their designated bargaining agent." 228 N.L.R.B. at 448.

ination is offensive in all of its manifestations, the Board's approach is in keeping with this Court's recognition that "[t]he central purpose of the Act [is] to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991).[6]

The Board's *Handy Andy* policy is constitutional; the certification of the union does not endorse, authorize, or sponsor past or future racial discrimination. This Court has observed that it would raise constitutional concerns if a union were certified to act as the exclusive representative of employees without simultaneously having a duty of fair representation that prohibits arbitrary or invidious action with respect to represented employees. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 198-199 (1944). The Court has never suggested, however, that the Constitution, or any other source of federal law, requires that a union that has fairly won an election be denied representative status because it has engaged in racial discrimination in the past.

b. As the court of appeals observed, "no court has explicitly rejected *Handy Andy*." Pet. App. A12 n.9.

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[6] In a different context, this Court has recognized that the "right to be free of racial discrimination * * * cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 69 (1975). In holding that employees were not entitled to bypass their collective bargaining agent and bargain directly with their employer over conditions of employment as they affected racial minorities, the Court explained that the duty of fair representation, enforced through unfair labor practice proceedings, provides adequate "safeguards for the protection of minority interests." *Id.* at 65.

Indeed, the decision below is the first published opinion in more than a decade to address the issue. Moreover, it accords with *Bell & Howell Co.* v. *NLRB*, 598 F.2d 136 (D.C. Cir.), cert. denied 442 U.S. 942 (1979), which is the only other decision that squarely considered the validity of *Handy Andy*. In *Bell & Howell*, the court of appeals held that the National Labor Relations Act does not require the Board "to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination relates to past union misconduct outside the bargaining unit that the union seeks to represent." 598 F.2d at 148. The court rejected the claim that the Board's certification of a union charged with prior acts of discrimination would "authorize," "encourage," or "significantly involve[]" the government in such discrimination in violation of the Fifth Amendment. *Id.* at 149. The court pointed out that "[f]ar from authorizing and encouraging discrimination, certification subjects the union to additional sanctions for any future discrimination," including cease and desist orders and monetary remedies for victims of discrimination. *Ibid.*[7]

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[7] The court of appeals reserved the issue of "whether a different result is required where the union's constitution or by-laws, or explicit conduct in a representation election, establish that the union will discriminate in the unit in question." *Bell & Howell*, 598 F.2d at 150 n.46. That issue is not presented in this case. See Pet. App. A12. Moreover, petitioner errs in claiming (Pet. 20) that the reserved issue in *Bell & Howell* implies that the court of appeals adopted "a different variation of the *Handy Andy* rule." The Board's decision in *Handy Andy* left open the possibility that evidence of racial discrimination could be considered in representation proceedings where it had a direct impact on the fairness of the elec-

Contrary to petitioner's assertion (Pet. 17-20), the Fifth and Ninth Circuits have not rejected *Handy Andy*. In *Natter Mfg. Corp.* v. *NLRB*, 580 F.2d 948, 951-952 n.2 (9th Cir. 1978), cert. denied, 439 U.S. 1128 (1979), the court found it unnecessary to reach "the correctness of the Board's *Handy Andy* rule," concluding that the Board had properly declined to provide the employer with a hearing because it had not presented a *prima facie* case that the union had engaged in racial discrimination. In two subsequent cases, the Ninth Circuit noted that it had not resolved the *Handy Andy* issue. See *Polynesian Cultural Center, Inc.* v. *NLRB*, 582 F.2d 467, 477 n.5 (1978); *Graphic Arts Int'l Union, Local No. 380* v. *NLRB*, 596 F.2d 904, 912-913 n.11 (1979). In *NLRB* v. *Heavy Lift Service, Inc.*, 607 F.2d 1121 (1979), cert. denied, 449 U.S. 822 (1980) (Pet. 19), the Fifth Circuit did express the view that properly supported allegations of union racial discrimination may be raised as a defense to a refusal to bargain complaint. That statement was dictum, however, because the court of appeals agreed with the Board that the employer had failed to submit adequate evidence of racial discrimination to overcome a motion for summary judgment. 607 F.2d at 1123-1124. Accord: *Skyline Corp.* v. *NLRB*, 613 F.2d 1328, 1335 & n.4 (5th Cir. 1980) (Pet. 19).[8]

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tion process, see *Handy Andy*, 228 N.L.R.B. at 454, which would be likely if the union's constitution or by-laws expressly required discrimination.

[8] In two pre-*Handy Andy* decisions cited by petitioner (Pet. 17-18), the Fifth Circuit likewise found that the employers had not made a prima facie showing of union racial discrimination that would warrant an evidentiary hearing on their allegations. See *NLRB* v. *Bancroft Mfg. Co.*, 516 F.2d 436,

It is true that the Eighth Circuit in *NLRB* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (1973) (Pet. 16), concluded that "constitutional limitations on the Board's process require recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned." 473 F.2d at 474. The basis of that holding was the court's belief that "[f]ederal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimatizes and perpetuates such invidious practices." *Id.* at 477. In our view, the Eighth Circuit's constitutional analysis is incorrect. As the Board made clear in *Handy Andy*, it does not approve of past union discrimination, or license the union to engage in it in the future, by certifying the union as representative. This Court's decisions also make clear that the government's involvement in certifying the union is not tantamount to endorsing all prior actions of the union. Cf. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]").

Although the Eighth Circuit's decision is at odds with the decisions of other courts, that court has had no occasion to reconsider its holding in *Mansion*

446-447 (1975), cert. denied, 424 U.S. 914 (1976); *NLRB* v. *Sumter Plywood Corp.*, 535 F.2d 917, 929-931 (1976), cert. denied, 429 U.S. 1092 (1977). Moreover, in *Sumter* the court said only that union racial discrimination "can be a proper issue for the Board to consider" (535 F.2d at 930), not that the Board *must* consider it at the certification stage.

House in the nearly 20 years since the decision was issued. If the issue arises again, the Eighth Circuit may well resolve it differently, in light of the Board's subsequent decision in *Handy Andy*, the D.C. Circuit's analysis in *Bell & Howell*, and developments in state action jurisprudence. Given that the issue does not arise frequently, and the conflict may well be resolved without this Court's intervention, we do not believe that this Court's review is warranted.

2. Petitioner contends (Pet. 24-34) that the court of appeals erred when it denied petitioner's motion to require the Board to submit to the court all of the evidence that the Regional Director considered in dismissing petitioner's election objections. The court of appeals, however, expressly declined to reach "the merits" of that issue, because it held that petitioner had failed to present it to the Board. Pet. App. A16, citing *Van Leer Containers, Inc.* v. *NLRB*, 841 F.2d 779, 782-783 (7th Cir. 1988); *NLRB* v. *Browning-Ferris Industries of Louisville, Inc.*, 803 F.2d 345, 350 (7th Cir. 1986); *NLRB* v. *Affiliated Midwest Hospital, Inc.*, 789 F.2d 524, 533 (7th Cir. 1986). Because the court of appeals relied on petitioner's waiver without addressing the merits of its motion, this case does not squarely present the issue of petitioner's disagreement with the Board's policy on the composition of the administrative record.[9] The issue

[9] Several circuits have criticized the Board's policy, but petitioner would not prevail even under the approach adopted in those circuits. For example, in *NLRB* v. *West Coast Liquidators, Inc.*, 725 F.2d 532 (9th Cir. 1984) (Pet. 26), the court disapproved the Board's policy of excluding employee affidavits from the administrative record. 725 F.2d at 535. The court added, however, that it would not remand a case to the Board "merely because the Regional Director fails to forward all evidence he relied upon in his report" when, "even

it presents is whether the court of appeals properly ruled that petitioner waived its objection to the scope of the administrative record. That claim does not warrant this Court's review.

a. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts of appeals lack jurisdiction to con-

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assuming the truth of the employer's allegations, there was no reason to overturn the election," *id.* at 535 n.2, which is the case here. Similarly, in *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 357-359 (6th Cir. 1983) (Pet. 26), the court disapproved the Board's policy but explained that "if the objector's allegations would not warrant a new election even if true, the objector has not been prejudiced," 716 F.2d at 356; the effect of the Board's policy in judicial proceedings is to "relieve[] the objector of its general obligation to provide detailed factual support for his assertions and [to] require[] [the] court to give the objector the benefit of all favorable inferences." *Id.* at 358 n.14. In *NLRB* v. *Klingler Electric Corp.*, 656 F.2d 76 (5th Cir. 1981) (Pet. 26), the court interpreted the Board's former rule to require inclusion in the administrative record of witness statements relied upon by the Regional Director. 656 F.2d at 83. The court added, however, that, if the Regional Director rejected objections solely on the ground that the objector had not presented a prima facie case, the Board is not required to include in the record material other than that presented by the objector. *Id.* at 81-82. In *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980) (Pet. 27), the court found that the Board had "failed to comply with its own regulations" (622 F.2d at 1197) in requiring the objector to append the material it submitted to the Board on review, rather than requiring the Director to submit the material he considered in dismissing the objections. *Id.* at 1198-1199. Subsequently, in *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1361-1362 (1983) (Pet. 27 n.9), which involved the current Board rule, the Fourth Circuit held that an employer could not complain about the absence from the record of affidavits it had submitted to the Regional Director but had not then appended to its exceptions, as the rule required.

sider claims that were not urged before the Board, unless the failure to object to the Board is excused by "extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). In this case, petitioner challenges the fact that the Board did not require inclusion in the administrative record of witness statements gathered by the Regional Director in the course of his investigation of petitioner's objections to the election. See *Summa Corp.*, 265 N.L.R.B. 343 (1982), enforced, 734 F.2d 21 (9th Cir. 1984) (Table); 29 C.F.R. 102.69(g)(1)(ii).[10] Petitioner never asked the Board to supplement the record, however. Nor did petitioner give the Board "the opportunity to interpret its rule [governing the exclusion of witness statements]—and to attempt to justify it—in the concrete circumstances of this case before the matter

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[10] In *Summa Corp.*, the Board clarified that under its revised rule (29 C.F.R. 102.69(g)(1)(ii)), in election cases that do not involve a hearing, witness statements obtained by the Regional Director as part of his investigation are not included in the record transmitted to the Board. The Board stated that witness statements are excluded "in accord with our policy, upheld * * * in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), of protecting investigatory affidavits from disclosure." 263 N.L.R.B. at 343. The Board also explained that "the burden is on the objecting party to demonstrate to the Board that the evidence it submitted to the Regional Director, if credited, would warrant setting aside the election." *Ibid.* Accordingly, the Board held that it could review the Regional Director's determination that the objecting party had not sustained its burden on the basis of the evidence presented by that party. *Id.* at 343-344.

was presented" to the court of appeals. Pet. App. A17.

Petitioner asserts (Pet. 30-31) that Section 10(e) is not applicable here because the scope of the record before the court of appeals is not a matter for the Board to determine. That attempt to reformulate the issue is misguided. The Board overruled petitioner's objections to the election without a hearing, and without considering the witness statements gathered by the Regional Director. In attacking the Board's order in the court of appeals, petitioner's challenge raised the issue of whether the Board abused its discretion in denying petitioner a hearing based on the administrative record forwarded by the Regional Director. That issue did not require the court to make its own evaluation of whether a hearing was required, but to determine whether the *Board* erred in failing to require the witness statements to be included in the record before concluding that a hearing was unnecessary. Accordingly, the issue of the state of the record was one that petitioner should have raised before the Board prior to presenting it in court.

Nor is this a case calling for application of the "extraordinary circumstances" exception to Section 10(e). Petitioner suggests (Pet. 31) that an objection before the Board would have been futile in light of the Board's rules and practice, but the perceived futility of raising an issue does not overcome the jurisdictional bar imposed by Section 10(e). See *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) ("Repetition of the objection * * * might lead to a change of policy, or, at least [serve as] notice of the accumulating risk of wholesale reversals being incurred by [the agency's] persist-

ence.").[11] Petitioner states (Pet. 31-32) that it could not have raised its objection in the representation proceeding because changes in the Board's rules can be accomplished only through a rulemaking proceeding. The Board, however, has broad latitude to interpret its rules in the context of a particular proceeding, especially when dealing with rules that govern only its internal procedures, a subject that does not implicate the full panoply of notice-and-comment rulemaking procedures. See 5 U.S.C. 553(b)(3)(A) (APA rulemaking procedures are inapplicable "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

b. Even if petitioner were correct in contending that the interview statements gathered by the Regional Director should have been included in the administrative record, it would not affect the outcome of this case. The court of appeals explained that, accepting petitioner's submissions as true, petitioner "proffered no specific evidence of conduct sufficient to set aside the election."

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[11] But see *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 356-358 (6th Cir. 1983) (holding that Section 10(e) did not bar a challenge to the absence from the administrative record of witness statements because an objection before the Board would have been futile). Under the Board's prior rule, some courts waived the Section 10(e) bar because of the conclusion that the rule's definition of the administrative record was ambiguous. See *NLRB* v. *Advanced Systems*, 681 F.2d 570, 574-575 (9th Cir. 1982); *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980). Those cases, however, afford no comfort for petitioner's claim (Pet. 32-33) of lack of notice. The Board's current rule, and its interpretation of it in *Summa Corp.*, plainly put petitioner on notice of the Board's policy.

> [O]ur review of the record indicates that the hearing officer accepted as true the Company's allegations, but considered these allegations insufficient to set aside the election. The Company's contention that employees feared losing their pension rights was accepted as true, but found insufficient to warrant an evidentiary hearing because these employee fears were not attributable to any statement made by the Union; the Company's contention that a union steward threatened employees with "blackballing" was accepted as true, but found insufficient to invalidate the election because these threats were temporally distant from the election and had not been disseminated to other employees; the Company's allegation that the Union issued apprenticeship cards was accepted as true, but found insufficient to overturn the election because these cards were issued pursuant to established practice.

Pet. App. A10.[12] In short, petitioner's "allegations did not meet *its* burden to point to "substantial" and

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[12] Petitioner's contention (Pet. 25-27) that the court of appeals relied on material not of record to enforce the Board's order is wide of the mark. At most, the court took into account that the Regional Director had found from his interviews that it was consistent with the Union's past practice to issue "B" apprentice cards to three apprentices. Pet. App. A9; Pet. App. A43-A46. Yet the court's conclusion did not rest on that evidence, but on the fact that *petitioner* "has not presented evidence that the Union issued apprentice cards outside the 'normal course of business' in order to influence the vote in the election." Pet. App. A9, quoting *St. Francis Federation of Nurses & Health Professionals* v. *NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984). It was petitioner's burden to offer such evidence, and mere speculation about the reasons for the Union's action is not sufficient.

material fact[s]" warranting a hearing on whether the election was tainted. 29 C.F.R. 102.69(d). Petitioner's quarrel with that finding (Pet. 27-29) raises a factbound issue that does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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